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No. 00-1089

In the

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Petitioner,

v.

ELLA WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99 (1999) 4, 9, 10, 11, 14

John W. Parry, *1999 Employment Decisions Under the ADA Title I – Survey Update*, 24 Ment. & Phys. Disability L. Rptr. 348 (May-June 2000) 9

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to insure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Pollard v. E.I. du Pont de Nemours & Co.*, No. 00-763 (U.S. June 4, 2001); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000); and *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

NELA members have brought numerous cases under the Americans with Disabilities Act (ADA). NELA members have also represented thousands of individuals in this country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect, and defend the interests of

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[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* NELA states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

employees involved in workplace disputes, as such, NELA has a compelling interest in ensuring that the goals of the ADA are protected and fully realized.

INTRODUCTION

As this Court has recognized, the Americans with Disabilities Act of 1990 ("ADA")[2] extends civil rights protections to those in our society with "substantial limitations on major life activities, not utter inabilities." *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). "The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland v. Policy Mgmt. Syst. Corp.*, 526 U.S. 795, 801 (1999) (citing 42 U.S.C. § 12101(a)(8), (9)).

The overarching goal of the ADA is the removal of artificially constructed barriers that restrict access to full citizenship for the more than 17%[3] of the Nation's population that has one or more disabilities. These barriers—both concrete and attitudinal—prevent people with disabilities from being productive members of our society, relegating them to second-class citizenship, dependant upon state and

[2] 42 U.S.C. § 12101 *et seq.*

[3] Congress found that there were 43 million people with disabilities when the Act was passed in 1990, and the number was growing. In that year, the U.S. Census Bureau reported the nation's population at 248,709,873. *See* <http://www.census.gov>. Thus, Congress intended to extend civil rights coverage to 17.3% of the U.S. population and recognized that that proportion would likely rise over the years.

federal welfare systems for subsistence.[4] In 1990, the overwhelmingly bipartisan efforts of Congress (spearheaded by Senators Dole and Kennedy; ceremoniously signed by President George H.W. Bush) resulted in the most sweeping civil rights legislation in a generation. Indeed, the ADA fundamentally shifted the dominant paradigm of legislation regarding people with disabilities from one of handouts and entitlement programs to one of fundamental civil rights and citizenship. That legislation took direct aim at destructing the barriers that society had built.

Unfortunately, ten years after the adoption of the ADA, the Nation has seen the construction of yet another such barrier. This time, it is not a matter of the pernicious attitudes of those who intentionally discriminate against this class of people, but of the unjustifiably restrictive application of the law by many lower courts. The Petitioner would have this Court buttress that barrier. We urge the Court to reject that request and affirm the Sixth Circuit ruling.

SUMMARY OF ARGUMENT

1. There is a real and calculable trend in the lower courts that has turned the proclamations of both Congress and this Court on their head. To be specific, the lower courts have consistently misapplied the well-articulated standards for summary judgment[5] to the detriment of those seeking the protections of the ADA. *See* Ruth Colker,

[4] The legislative history of the ADA observes that "[e]xcluding the millions of disabled who want to work from the employment ranks costs society literally billions of dollars annually in support payments and lost income tax revenues." H.R. Report No. 101-485(II), 43 (quoting Statement by Vice President George Bush on Disabled Americans, March 31, 1988, p.2).

[5] Fed. R. Civ. Pro. 56; *see also* Fed. R. Civ. Pro. 50.

The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. L. Rev. 99, 110-26 (1999); Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Villanova L. Rev. 409, 536-51 (1997). In effect, the lower courts have ruled that in order to reach a jury, an ADA plaintiff must *prove* that he or she meets the statute's definition of disability, as opposed to *raising a triable issue* as to the question of whether he or she meets that definition. In so doing, the lower courts have ignored and/or misread binding precedents of this Court. *See e.g., Murphy v. United Parcel Svc.*, 527 U.S. 516, 524 (1999) ("The evidence that petitioner is regarded as unable to meet the DOT regulations is not sufficient to *create a genuine issue of material fact* as to whether petitioner is regarded as unable to perform a class of jobs using his skills.") (emphasis added); *see also Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133, 149-54 (2000) (unanimously reversing the lower court's improper application of standards for judgment as a matter of law in employment discrimination context). The district court's decision in this case demonstrates precisely this phenomenon. *See* Pet. App. 23a-47a. Petitioner now seeks to have that erroneous determination reinstated by overturning the Sixth Circuit's principled application of summary judgment standards.

2. In constructing this artificial barrier, the lower courts have ignored the teachings of this Court's past rulings on the definition of disability under both section 504 of the Rehabilitation Act of 1973[6] (Section 504) and the ADA. *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987); *Bragdon v. Abbott, supra*; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel*

[6] 29 U.S.C. § 794.

Svc., supra; *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Specifically, this Court's interpretation of the definition of disability has consisted of an application of common sense and common experience to the facts of the case. Where the plaintiff is the nonmoving party, this Court has not required that plaintiffs bring forth extensive testimony from retained experts in order to demonstrate a triable issue of fact as to disability, nor has it required that plaintiffs prove that they definitively met the statutory definition. Rather, the Court dispassionately approached each case with common sense and with an eye on the appropriate standard for summary judgment.

3. The Sixth Circuit panel in this case properly applied the relevant summary judgment standards and faithfully followed the teachings of this Court in regard to both those standards and the definition of disability. The panel considered all the evidence. Pet. App. 2a. It construed all inferences in favor of the nonmoving plaintiff. *Ibid.* The panel faithfully applied the substantive law. *Id.* at 3a-7a. Ultimately, the panel appropriately found that the respondent had presented sufficient evidence in regard to her disability to have a jury determine whether, in fact, she falls within the confines of the statutory definition of disabled, and is thereby eligible for the protections of the Act. *Id.* at 4a-5a. By urging this Court to reverse that finding, the Petitioner seeks to have this Court endorse the elevated burden of proof that the district court required of the Respondent. Not only should this Court reject that effort, it should also take this opportunity to instruct the lower courts as to the proper burdens to be assessed to a nonmoving plaintiff who is seeking to establish eligibility for coverage under the ADA.

ARGUMENT

I. THOUGH THIS COURT HAS ARTICULATED THE PROPER ROLE OF JUDGE AND JURY IN EMPLOYMENT DISCRIMINATION CASES, LOWER COURTS HAVE CONSISTENTLY SUBSTITUTED THEIR OWN JUDGMENT FOR THAT OF THE JURY AND UNJUSTIFIABLY HEIGHTENED THE BURDEN UPON ADA PLAINTIFFS.

A. The Lower Courts' Role on Summary Judgment is To Guard Against Frivolous and Facially Meritless Claims From Consuming Judicial Resources, Not To Pre-Judge The Ultimate Facts.

As restated last year, this Court has articulated an exacting standard for the grant of defense-initiated summary judgment in employment discrimination cases. *See Reeves v. Sanderson Plumbing Products, Inc.*, *supra*, 530 U.S. at 149-54. In *Reeves*, the unanimous Court summarized the combined teaching of what has become known as the summary judgment trilogy,[7] as follows:

1. The court must review the record, "taken as a whole";
2. The court must draw all inferences in favor of the nonmoving party;
3. The court may not make credibility determinations;
4. The court may not weigh evidence;
5. The court must disregard all evidence favorable to the moving party that the jury is not required to believe;

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

6. The court should give credence to the evidence favoring the nonmovant;
7. The court should give credence to the evidence that supports the moving party "that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses."

Id. at 150-51 (citations omitted). In the end, the court must ask whether a reasonable jury *might* find in favor of the plaintiff. *Liberty Lobby*, *supra*, 477 U.S. at 250. If so, then summary judgment must be denied.

The overriding theme of these instructions to the lower courts is that the jury is the true arbiter of such disputes. While the courts should vigilantly guard against wasting valuable resources on frivolous and facially meritless cases, the courts should be equally vigilant in assuring that civil rights plaintiffs have the opportunity to have their claims adjudicated by their peers.

It goes without saying that the plaintiff in an ADA case has a burden of production as the nonmoving party facing summary judgment. *Liberty Lobby*, 477 U.S. at 250. However, it cannot be overemphasized that this burden is only one of raising a genuine issue of material fact as to disability, not one of actually proving eligibility for coverage under the Act. *Murphy, supra*, 527 U.S. at 523-34; *see also Liberty Lobby*, 477 U.S. at 248 (a material fact is one that "might affect the outcome of the suit under governing law.") Moreover, the moving party has an initial burden of production to demonstrate that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. 317, 323. The moving party may not simply rest on a bare assertion; it must point to evidence in the record that no genuine dispute of material fact exists. *Id.* at 322; *Liberty Lobby*, 477 U.S. at 250; *Matsushita*, 475 U.S. at 585-88.

B. The Lower Courts Have Consistently Imposed an Almost Insurmountable Burden on ADA Plaintiffs at Summary Judgment

1. In an ADA case, as in any employment discrimination case, the plaintiff has the ultimate burden of demonstrating that she or he is eligible for the protections afforded by the statute. Unlike the more familiar cases brought for race or gender discrimination under the provisions of the Civil Rights Act of 1964,[8] demonstrating eligibility in an ADA case is more than a rote exercise of stating the obvious (*e.g.*, "the plaintiff is a woman"; "the plaintiff is African-American," etc.). Specifically, the plaintiff has the ultimate burden of persuasion, by a preponderance of the evidence, that she or he:

> (A) [has] a physical impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) [has] a record of such an impairment; or
>
> (C) [is] being regarded as having such an impairment.

42 U.S.C. § 12112(2). The question of how that burden has been allocated on defendants' motions for summary judgment is of primary concern.

It should be axiomatic that, on summary judgment, a nonmoving plaintiff need only demonstrate a disputed issue of material fact regarding her or his eligibility for coverage under the ADA. *See e.g., Murphy*, 527 U.S. at 523 ("The only issue remaining is whether the evidence . . . *is sufficient to create a genuine issue of material fact* as to whether petitioner is regarded as substantially limited in one or more major life activity." (emphasis added).) The lower courts, however, have articulated a much more demanding standard of proof in ADA cases. The combined effect of the multitudinous adverse rulings has meant that plaintiffs have been forced to actually *prove* that they meet the definition just to survive summary judgment. *See Duncan v. Washington Metro Area Transit Auth.*, 240 F.3d 1110, 1112 (D.C. Cir. 2001) (en banc), *petition for cert. filed*, May 25, 2001 (Edwards, C.J., dissenting) ("The result reached by the majority in this case will make 'work' impermissibly underinclusive when viewed as a major life activity, in a way that appears to defy Congress' mandate in enacting the ADA."); *Thornton v. McClatchy Newspapers, Inc.*, ___ F.3d ___, 2001 U.S. App. LEXIS 18372 * 35-36 (9th Cir. Aug. 15, 2001) (Berzon, J., concurring in part, dissenting in part) (decrying the majority's "en masse, quantitative approach to assessing the significance of various manual tasks" as an unjustifiably heightened scrutiny for determining whether a plaintiff is substantially limited).

Indeed, extensive statistical analysis confirms that only the very select few ADA plaintiffs are permitted to see a jury. *See* Colker, *supra*, 34 Harv. C.R.-C.L. L. Rev. at 119 ("The overwhelming trend under the ADA has been for judges to decide most of the normative, factual issues themselves and rarely send cases to the jury.");[9] *see also* John W. Parry, *1999 Employment Decisions Under the ADA Title I—Survey Update*, 24 Ment. & Phys. Disability L. Rptr. 348 (May-June 2000) (finding that employers are victorious in 95.7% of ADA cases brought under Title I). In her authoritative study, Professor Colker created a data set from all available opinions from 1992-1998 regarding Title I of the ADA. 34 Harv. C.R.-C.L. L. Rev. at 103. She

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[8] 42 U.S.C. § 2000e *et seq.*

[9] Importantly, through her analysis, Professor Colker found that, due to tendencies in reporting of decisions, the defendants' victory rate was actually *underrepresented* in the final tally. *Id.* at 105.

gleaned rulings from all available sources, official and otherwise, and detailed the outcomes. *Id.* at 103-05. After employing accepted statistical principles, Professor Colker discovered that the lower courts have amassed a startling record of employer victories in ADA cases, with a remarkably high rate of grants of summary judgment. *Id.* at 103-110.[10] "These results are worse than results found in comparable areas of law; *only prisoner rights cases fare as poorly*." *Id.* at 100 (citation omitted) (emphasis added).

Obviously, the above findings are not in line with Congressional proclamations that disability discrimination "continue[s] to be a serious and pervasive social problem" and that in excess of 17% of our population has one or more disabilities. 42 U.S.C. § 12101(a)(1), (2); *see also* Burgdorf, *supra*, 42 Villanova L. Rev. at 539 ("The results in many of these decisions are manifestly inequitable and, because the constriction of the protection against discrimination is at odds with the underlying aims of the ADA and the Rehabilitation Act, often illogical.").[11]

Other scholars have reached similar conclusions regarding the high rates of employer victories in ADA cases, but ascribe them to different causes. *See generally*, Jeffrey A. Van Detta, Dan R. Gillipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury? A Response to Professor Colker*, 19 Rev. Litig. 505 (2000). However, the solutions posed by those critics simply go to prove the point. Van Detta and Gillipeau argue that ADA

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[10] A more thorough detail of Professor Colker's findings broken down by Circuit is published at <http://www.osu.edu/units/law/colkerapp-a.htm>.

[11] The Court will recall that Professor Burgdorf was the drafter of the original bill that became the ADA. *See Sutton, supra*, 527 U.S. at 485.

plaintiffs lose summary judgment at such high rates because they fail to properly present their cases to the court. Specifically, Van Detta and Gillipeau criticize ADA plaintiffs (and their attorneys) for failing to bring detailed, expert vocational testimony to the attention of the court at summary judgment. *Id.* at 531. However, requiring ADA plaintiffs to obtain and proffer expert testimony at the summary judgment stage for purposes of raising a triable issue as to disability is no more than the insertion of an artificial barrier to people with disabilities. No other protected class is required to proffer such time-consuming and costly testimony. No other protected class is forced to hurdle such high evidentiary burdens on summary judgment. Indeed, requiring such a burden is in direct contradiction to the regulatory admonition that a plaintiff's *ultimate* burden (*i.e.*, at trial) is "not onerous." 29 C.F.R. § 1630.2, App. § 1630.2(j). All that should be required is reliable evidence of the impairment and commonsense analysis of major life activities and how they are affected by that impairment. Indeed, that is all that this Court has needed in making the same determination. *See infra* § II. In the final analysis, it is undeniable that "the summary judgment tool [is] a device used with great frequency at the trial court level to dispose of ADA cases in favor of defendants." Colker, 34 Harv. C.R.-C.L. L. Rev. at 126.

2. The cases behind the stark statistics demonstrate how these judicially-created barriers have displaced commonsense analysis and the plain meaning of the statute. The lower courts have routinely dismissed cases where the plaintiff has such obvious disabilities as severe and chronic depression,[12] obsessive compulsive dis-

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[12] *Schneiker v. Fortis Insurance Company*, 200 F.3d 1055 (7th Cir. 2000) (benefits analyst with depression and alcoholism requiring

(continued...)

(...continued)
hospitalizations, medication, outpatient care, and AA meetings not substantially limited); *Pack v. Kmart Corporation,* 166 F.3d 1300 (10th Cir. 1999) (employee with major depression, terminated after 18 years, not disabled despite chronic sleeping problems); *Spades v. City of Walnut Ridge,* 186 F.3d 897 (8th Cir. 1999) (police officer with depression who attempted suicide not substantially limited); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997) (employee with chronic depression, terminated after 15 years, not disabled despite difficulties in interacting with others); *Scherer v. G.E. Capital Corp.,* 59 F. Supp. 2d 1132 (D. Kan. 1999) (fraud investigator with bipolar disorder and obsessive compulsive disorder not disabled); *Robb v. Horizon Credit Union,* 66 F.Supp.2d 913 (C.D. Ill. 1999) (credit union employee with depression and suicidal episode requiring three-week hospitalization and two-month leave of absence, who returned to work to encounter office gossip regarding her "nervous breakdown," was not substantially limited); *Matuska v. Hinckley TWP,* 56 F. Supp. 2d 906 (N.D. Ohio 1999) (laborer with depression, post-traumatic stress disorder, panic attacks and hospitalization not disabled); *Osika v. Board of Education,* 1999 U.S. Dist. LEXIS 17996 (N.D. Ill. 1999) (high school teacher with clinical depression not disabled despite testimony regarding problems caring for self); *Nave v. Woolridge Construction*, No. 96-2891, 10 N.D.L.R. ¶ 183, 1997 U.S. Dist. LEXIS 9203 (E.D. Pa. 1997) (landscape worker with Hodgkin's disease and related major depression, terminated four months after return from leave of absence for treatment and less than a month after fainting episode at work, not disabled); *Gaul v. AT&T,* 955 F. Supp. 346 (D. N.J. 1997) (senior technical associate with stress disorders and major depression requiring at least one hospitalization not disabled); *Thompson v. City of Arlington*, 838 F. Supp. 1137 (N.D. Tex. 1993) (police officer with depression, suicide attempt, and hospitalization not disabled); *Sarko v. Penn-Del Directory Co.*, 968 F. Supp. 1026 (E.D. Pa. 1997) (top performing telephone sales representative with depression and anxiety, terminated for tardiness related to medications, was not substantially limited); *Overton v. Tar Heel Farm Credit*, 942 F.

(continued...)

order,[13] paralysis from stroke,[14] hemophilia,[15] severe asthma,[16] traumatic brain injury,[17] epilepsy,[18] multiple

(...continued)
Supp. 1066 (E.D.N.C. 1996) (employee with obsessive compulsive disorder, anxiety and depression, terminated within three days of employer learning of conditions, not disabled); *Marschand v. Norfolk & Western Railway Co.*, 876 F. Supp. 1528 (N.D. Ind. 1995), *subsequent judgment aff'd*, 81 F.3d 714 (7th Cir. 1996) (train engineer with post-traumatic stress disorder and mental breakdown following fatal train accident not disabled); *Kaniff v. Allstate Ins. Co.*, 1996 U.S. Dist. LEXIS 2248 (N.D. Ill. 1996), *aff'd on other grounds,* 121 F.3d 258 (7th Cir. 1997) (insurance agent with depression requiring two-year leave of absence not disabled).

[13] *Scherer v. G.E. Capital Corp., supra*; *Overton v. Tar Heel Farm Credit, supra.*

[14] *Reidlich v. Albany Law Sch.*, 899 F. Supp. 100 (N.D.N.Y. 1995) (college professor with partial paralysis from stroke, not substantially limited).

[15] *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

[16] *Tangires v. The Johns Hopkins Hospit.*, 79 F. Supp. 2d 587 (D. Md. 2000) (interior design coordinator with lifelong asthma terminated after hospitalization for severe asthma attack and other respiratory-related ailments, not disabled); *Muller v. Costello,* 187 F.3d 298 (2d Cir. 1999) (correctional officer with severe bronchitis and asthma causing numerous emergency room visits and absences not substantially limited in breathing).

[17] *Phillips v. Wal-Mart Stores,* 78 F. Supp. 2d 1274 (S.D. Ala. 1999) (employee with traumatic brain injury causing four-month coma, blurred vision, and slowed speech, was terminated after encountering on-the-job jokes about his slow speech and thinking, but was not disabled).

[18] *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001) (factory worker who experienced nocturnal and daytime seizures once or

(continued...)

sclerosis,[19] and seizure disorder.[20] The absurdity of these rulings is only emphasized in light of the legislative history of the ADA, which recognized emotional illness, epilepsy, and multiple sclerosis among the many sources of disabilities. H.R. Rep. No. 101-485(II) 51-52.

To be sure, not all cases should reach a jury. The summary judgment mechanism can be properly utilized to ensure that only legitimate cases proceed. However, frivolous cases make up only a minuscule proportion of the cases being thrown out on summary judgment. *See* Colker, 34 Harv. C.R.-C.L. L. Rev. at 106 (eliminating all frivolous cases from data set—resulting in the elimination of fewer than twelve cases).[21] In contrast, lower courts have routinely found plaintiffs to be not disabled in a wide array of

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(...continued)
twice a week not disabled); *Arnold v. City of Appleton*, 97 F. Supp. 2d 937 (E.D. Wis. 2000) (applicant denied firefighter position after disclosure of epileptic condition, not disabled); *Popko v. Pennsylvania State Univ.*, 84 F. Supp. 2d 589 (M.D. Pa. 2000) (medical technologist with sleep-related seizure disorder not disabled); *Rutlin v. Kerley & Starkes*, 75 F. Supp. 2d 735 (W.D. Mich. 1999) (funeral director with epilepsy not disabled); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999) (stocker with lifelong epilepsy not disabled).

[19] *Sorensen v. University of Utah*, 194 F.3d 1084 (10th Cir. 1999) (nurse with multiple sclerosis, forcibly reassigned immediately after five-day hospitalization, not disabled).

[20] *Spradley v. Custom Campers, Inc.*, 68 F. Supp. 2d 1225 (D. Kan. 1999) (transportation worker with generalized seizure disorder causing black-outs not disabled).

[21] Professor Colker classified frivolous cases as "those that sued a non-covered entity, sued for conduct that occurred before the ADA became effective, or otherwise brought a claim that could not possibly be covered by the ADA." 34 Harv. C.R.-C.L. L. Rev. at 106, n. 39.

cases where common experience would militate against such rulings.[22]

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[22] *Thornton v. McClatchy Newspapers, Inc.*, *supra* (newspaper reporter who is restricted to continuous typing no more than 30 minutes per day or intermittent typing no more than 90 minutes per day and continuous handwriting no more than 5 minutes per day, not disabled); *Duncan v. Washington Metro Area Transit Auth.*, *supra* (reversing jury verdict in favor of transit worker who presented medical evidence of back injury and testified about restricted employability); *Weber v. Idex Corp.*, 186 F.3d 907 (8th Cir. 1999) (sales manager with heart disease, heart attack, hypertension, and multiple hospitalizations not disabled); *EEOC v. R. J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999) (blood cancer not an "actual" disability); *Berg v. Norand Corp.*, 169 F.3d 1140 (8th Cir. 1999) (financial manager with diabetes and psychiatric impairment requiring involuntary hospitalization, terminated several months later, not disabled); *Zirpel v. Toshiba America Information Systems*, 111 F.3d 80 (8th Cir. 1997) (terminated quality control manager with panic disorder hampering ability to breathe and speak was not disabled); *Sanders v. Arneson Products*, 91 F.3d 1351 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997) (production manager with cancer, diagnosed by psychiatrist as having psychological reaction to illness, terminated after taking leave of absence for psychological difficulties, not disabled); *Tone v. U.S.P.S.*, 68 F. Supp. 2d 147 (N.D. N.Y. 1999) (tractor trailer operator who lost left eye to cancer not disabled); *Piascyk v. City of New Haven*, 64 F. Supp. 2d 19 (D. Conn. 1999) (patrol officer with multiple injuries from car accident, including arthritis and chronic sprain injuries, and who was rejected from promotion with statement, "you're injured," was not disabled); *Hurley v. Modern Continental Construction Company*, 54 F. Supp. 2d 85 (D. Mass. 1999) (project engineer with cardiac impairment causing loss of consciousness, and requiring two-month hospitalization and cardiac defibrillator, not disabled); *Glidden v. County of Monroe*, 950 F. Supp. 73 (W.D.N.Y. 1997) (applicant for nursing position, denied position after disclosing prior hospitalization for nervous breakdown, does not have disability).

Two recent cases demonstrate how tortured the application of the statutory definition of disability has become. In *Duncan v. Washington Metro. Transit Auth.*, *supra*, the D.C. Circuit, sitting en banc, reversed a jury finding for the plaintiff on the grounds that he had not produced sufficient evidence that he was disabled.[23] Mr. Duncan was employed by the transit authority as a custodian and parts runner. 240 F.3d at 1113. Over the years, Mr. Duncan developed back injuries that significantly limited his ability to lift. *Id.* at 1125-126 (Edwards, C.J., dissenting.). At trial, Mr. Duncan presented expert medical testimony and his own testimony regarding the nature, degree, and severity of his impairment. *Id.* at 1115. Mr. Duncan also presented evidence as to the range of jobs at the transit authority from which he was precluded and testified about his unsuccessful attempts to find employment in the region. *Id.* at 1115; *see also id.* at 1124-125 (dis. op.).

In overturning the jury's verdict, the D.C. Circuit announced that it was requiring plaintiffs to produce specific evidence as to "the number and kind of jobs available" to them in the geographic area in order to prove that they are substantially limited in the major life activity of working. *Id.* at 1115. The court took this drastic action even though the jury came to its decision after it was properly instructed as to the standards for proving disability. *Id.* at 1122 (dis. op.). The problems with the standard set in *Duncan* revolve around how plaintiffs are to produce such evidence. The court opined that it was not such a heavy burden; that such evidence could be demonstrated by use of statistics, like those found on the internet. *Id.* at 1117

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[23] The defendant appealed from a denial of a post-trial motion for judgment as a matter of law, pursuant to Fed. R. Civ. Pro. 50, which utilizes the identical standard as a motion for summary judgment pursuant to Rule 56. *See Reeves*, 530 U.S. at 149.

n. 5. Of course, the court failed to address how those statistical reports could be offered in order to overcome foundational and hearsay objections. Instead, what the court did was raise the standard of proof for a plaintiff in an ADA case.

The even more recent case from the Ninth Circuit demonstrates the elevation of form over function in this analysis to a degree that does not comport with the statutory language or the goals of the legislation. In *Thornton v. McClatchy Newspapers, Inc.*, *supra*, the court affirmed summary judgment against a newspaper reporter who has severe impairments to her arms and wrists. Ms. Thornton's physician had limited her typing and writing activities to (1) no more than 30 minutes per day of continuous keyboard use; (2) no more than 5 minutes per day of continuous handwriting; (3) no more than 60 minutes per day of intermittent keyboarding; and (4) no more than 60 minutes per day of intermittent handwriting. *Id.* at *3. Despite these obviously severe and widely impacting restrictions, the majority rejected Ms. Thornton's claims of disability, proclaiming that she had not submitted enough evidence of disability. *Id.* at *8-*20. Specifically, the court faulted her for not "present[ing] specific evidence about relevant labor markets." *Id.* at *10-*11.

In so ruling, the court completely disregarded any commonsense analysis of the true impact of Ms. Thornton's impairments. As the dissent astutely points out,

> It should not be necessary to prove that the ability to use one's arms and hands to produce, by computer (or by handwriting), written communication and records is a manual skill of enormous importance in our literate and technological society, and thus, "in the life of the average person." [citation]. The majority opinion, however, ignores this reality, treating the inability to perform the manual tasks of writing and keyboarding

as equivalent to, for instance, the inability to perform the task of "cutting foamboard."

Id. at *29 (Berzon, J., dissenting) (citations omitted). Instead, the court reaffirmed its heightened standard of proof for ADA plaintiffs.

II. THIS COURT'S PRECEDENTS INTERPRETING THE DEFINITION OF "DISABILITY" DEMONSTRATE THAT THE LOWER COURTS ARE IMPOSING AN OVERLY RESTRICTIVE ANALYSIS.

The phenomenon demonstrated above is simply not justified in light of this Court's prior decisions regarding the definition of "disability" in cases brought under the ADA and Section 504. Indeed, this Court has dutifully employed a commonsense approach to the question of disability.

In the first case in which this Court addressed the statutory definition of disability, *School Board of Nassau County v. Arline, supra,* the Court found that a woman with a history of tuberculosis met that definition. 480 U.S. at 280-81. In support of her claim, Ms. Arline adduced testimony from a physician who, after reviewing the medical records, testified that Ms. Arline's tuberculosis had affected her respiratory system and she required hospitalization for treatment. *Id.* at 276, 281. Based on this evidence, alone, this Court concluded that Ms. Arline met the statutory definition of disability. *Id.* at 281. Indeed, the Court concluded that the evidence of hospitalization was "*more than sufficient* to establish that one or more of her major life activities were substantially limited by her impairment." *Ibid.* (emphasis added). Notably, that hospitalization occurred *22 years prior to the adverse employment action* at issue in that case. *Id.* at 276, 281. Since that brief hospitalization, the only evidence of the disease was when it was detected in routine blood testing. *Id.* at 276. The

Court required no elevated standard of proof for the determination of disability. It required no expert testimony on the topic of what major life activities were impacted. It required no extensive statistical analysis of how Ms. Arline's impairment limited her employability. Rather, the Court engaged in a commonsense analysis—in line with the underlying nondiscrimination principles of Section 504.

In *Bragdon v. Abbott, supra*, the Court similarly engaged in a commonsense approach in holding that a woman with asymptomatic Human Immunodeficiency Virus (HIV) met the ultimate burden of persuasion (*i.e.*, the plaintiff moved for summary judgment) that she was disabled under the ADA. Relying upon generalized findings of medical studies, the Court first found that HIV is an impairment. 524 U.S. at 632-37. After finding that reproduction is a major life activity, the Court ruled that HIV presents a substantial limitation to that activity. *Id.* at 637-42. In reaching this conclusion, the Court relied upon the respondent's own testimony and evidence gleaned from medical studies that there is an 8% risk of transmitting HIV during gestation and childbirth. *Id.* at 639-42. As the Court recognized, "[w]hen significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Id.* at 641. Again, this was the *plaintiff's* motion for summary judgment—her burden as the moving party was the same as at trial. *Ibid.* Even in this setting, her reliance on general medical data, in combination with her own testimony, was sufficient to meet that burden. It follows that a nonmoving plaintiff need not demonstrate the same level of evidence as adduced in *Bragdon*.

In *Sutton v. United Air Lines, Inc., supra*, the Court also relied on common sense in its analysis of whether the petitioners were "regarded as" substantially limited (42 U.S.C. § 12102(2)(C)) in the major life activity of working.

527 U.S. at 487-494.[24] The petitioners urged the Court to recognize "global airline pilot" as a class of jobs from which the respondents believed them to be precluded. *Id.* at 490-91. The Court rejected that argument, holding that such a category was too narrow to be considered a class of jobs. *Id.* at 491-94. Again, there was no need for broad statistical analysis or expert testimony, just enough common sense to make the statutory definition have some meaning. *See also Albertson's, Inc. v. Kirkingburg*, *supra*, 527 U.S. at 566-67 (observing that, based on the normal severity of the condition "people with monocular vision 'ordinarily' will meet the Act's definition of disability"; rejecting the respondent's claim because of his individual characteristics and symptomology.)

Finally, in *Murphy v. United Parcel Svc., Inc.*, *supra*, the Court determined that the petitioner had failed to adduce any evidence that he was regarded as substantially limited in the major life activity of working. 527 U.S. at 521-25. The sole evidence that the petitioner set forth in opposing summary judgment was testimony from his employer that he was precluded from being a mechanic when an essential function of the position included DOT certified driving. *Id.* at 522-24. The record in *Murphy* demonstrated that the petitioner's job as a mechanic was unique in that it required a DOT certification—something that is only required of people who drive vehicles weighing over 10,000 pounds. *Id.* at 524 (citing 49 C.F.R. § 390.5). As the Court stated, "Petitioner has put forward no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial motor vehicle and thus

[24] While *Sutton* was presented to the Court on appeal from a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court's interpretation of the statutory language is obviously instructive for summary judgment motions.

does not require DOT certification." *Id.* at 524. Therefore, the Court reached the conclusion that to establish a "regarded as" claim, a plaintiff must a least raise a disputed issue of material fact, *id.* at 523, that the employer believed the plaintiff to be precluded from more than a unique, job-specific requirement. Because the petitioner failed to present any evidence on this crucial issue, he failed to meet a properly articulated burden of production on motion for summary judgment.

Nothing in these cases justifies the heightened scrutiny currently being demanded of ADA plaintiffs by the lower courts. Read properly, the Court's precedents demonstrate a straightforward, commonsense approach to the definition of disability. No extensive statistical analysis is required. No submission of expert reports and testimony is necessary. Rather, in order to raise a disputed issue of material fact as to whether or not a plaintiff meets the statutory definition, plaintiffs need only produce some credible evidence that their impairment limits them in more than an isolated, specialized, or unique situation. More times than not, that determination can be based on common sense and a principled inquiry into the facts as presented.

III. THE SIXTH CIRCUIT DECISION BELOW DEMONSTRATES AN APPROPRIATE APPLICATION OF THE SUMMARY JUDGMENT STANDARD AND SHOULD BE AFFIRMED.

1. In the decision below, the Sixth Circuit engaged in an appropriate analysis of the evidence presented by the Respondent and found that she had raised a triable issue as to her substantial limitation in the major life activity of performing manual tasks. In reaching that conclusion, the appellate court followed this Court's instructions in regard to both the role of the courts on summary judgment, and the proper application of the definition of disability in the ADA.

At the district court, the Respondent proffered the following evidence in her effort to satisfy her burden and raise a triable issue as to her status as disabled.

> With regards to the major life activity of performing manual tasks, [Respondent's] evidence is that she "has been restricted by both the [Petitioner's] doctors and her personal doctor from performing manual tasks that require repetitive movement of her upper extremities or any work that must be performed above her chest level." [Citation]. In addition, she is "precluded from any manual task that requires rotary or lateral movements of her head and neck. . . ."

Pet. App. 36a (citations omitted). Instead of viewing this evidence in the light most favorable to the Respondent, *see Reeves, supra,* 530 U.S. at 150 (citations omitted), the district court engaged in a forbidden fact-finding, evidence-weighing exercise. *Id.* at 150-51. The district court completely disregarded common sense and even used the EEOC regulations to erect an artificial barrier. In particular, the district court faulted the Respondent for purportedly not presenting evidence of the nature, severity, and duration of her impairment. Pet. App. 36a (citing 29 C.F.R. § 1630.2(j) (2)). However, the district court disregarded evidence that it had cited previously. *See* Pet. App. 25a (listing *permanent* work restrictions imposed by the Respondent's physician). Accordingly, the district court failed to review the record, "taken as a whole." *Reeves, supra*, 530 U.S. at 150 (citing *Matsushita, supra,* 475 U.S. at 587). When considered in the light most favorable to the Respondent, there can be no doubt that the above-cited evidence is sufficient to raise a disputed issue of material fact as to the question of whether the Respondent was substantially limited in the major life activity of performing manual tasks.

Similarly, the district court rejected the Respondent's evidence that she is substantially limited in the major life

activity of working. Pet. App. 37a-42a. In support of her claim, the Respondent submitted the expert report of a vocational rehabilitation specialist. *Ibid.* She also relied upon her medical records and permanent work restrictions to raise a triable issue as to her substantial limitation. *Id.* at 38a n.4. As with her evidence regarding the performing of manual tasks, the district court engaged in a forbidden fact-finding, evidence-weighing exercise. *Reeves, supra*, 530 U.S. at 150-51. The expert report submitted by the Respondent opined that her physical impairment restricted her from 50% to 55% of available jobs. Pet. App. 38a. Had the district court properly drawn all inferences from this report in favor of the Respondent, *Reeves, supra,* 530 U.S. at 150 (citations omitted), it would have easily met the standard of "substantial limitation." This Court's ADA rulings mandate that result. *Bragdon, supra*, 524 U.S. at 641 (holding that an 8% likelihood of transmitting HIV during gestation and childbirth was sufficient to carry the ultimate burden of persuasion that the plaintiff was substantially limited in the major life activity of reproduction, instructing that the Act considers "substantial limitations on major life activities, not utter inabilities."); *see also ibid.* ("When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable.") The same would be true for the evidence derived from the medical documentation and testimony submitted by the Respondent. Pet. App. 38a, n.4; *Arline*, 480 U.S. 276, 281 (finding that the plaintiff had presented sufficient evidence to support a favorable jury finding where the only evidence submitted was testimony of a physician who reviewed the plaintiff's medical records).

The Sixth Circuit reversed. In so doing, the court properly recognized that it must "take the facts in the light most favorable to the plaintiff". Pet. App. 2a; *see also id.* at 4a. Ultimately, the panel concluded that

> [T]he plaintiff's set of impairments to her arms, shoulders and neck are sufficiently disabling *to allow the factfinder to find* she crosses the threshold into the protected class of individuals under the ADA who must be accorded reasonable accommodation.

Id. at 4a (emphasis added). The appellate court drew on common sense in stating that "[h]er ailments are analogous to having missing, damaged or deformed limbs . . . ." Pet. App. 4a. The Sixth Circuit further found that "the duration of [the Respondent's] impairment, as well as the permanent impact of it, are *inferable* from the permanent work restrictions prescribed by [her] treating physicians. *Id.* at 4a-5a (emphasis added). This statement represents the proper role of the court on summary judgment and a faithful application of that standard to the requirements of the ADA. *Reeves, supra,* 530 U.S. at 150-51 (citations omitted).

2. In its submission on the merits, the Petitioner asks this Court not only to endorse the district court's ruling, but further seeks to have this Court adopt a standard that raises the burden for all ADA plaintiffs even higher.

To begin, the Petitioner baldly asserts that in order to demonstrate a substantial limitation in the major life activity of performing manual tasks, plaintiffs must prove that they are "*severely restricted* from using their hands to perform a broad range of *basic functions* to meet the *essential demands* of everyday life." Pet. Br. at 12-13 (emphasis added). The Petitioner cites absolutely no authority for this proposition. There is a simple reason for that omission: none exists. The standard articulated by the Petitioner is found nowhere in the statute, implementing regulations, regulatory interpretation, legislative history, or case law. Indeed, it would be hard to imagine any plaintiff meeting this standard who could then go on to prove, as is a plaintiff's burden, that he or she is qualified to perform the

essential functions of the job they hold or desire. 42 U.S.C. § 12111(9). Rather, the Petitioner's standard would only expand the well-known Catch-22 (a.k.a "the double squeeze") of the ADA: that a plaintiff must be "disabled enough" to come within the confines of the Act, but not "too disabled" so that he or she cannot work at all.

The Petitioner then goes on to articulate four standards that are equally unsubstantiated by the plain meaning of the statute. Specifically, the Petitioner asserts that the ADA only covers those who (1) are "constrained from performing the basic functions in life"; (2) are "significantly restricted in important life functions"; (3) "have significant restrictions on fundamental life activities"; and (4) are "truly disabled." Pet. Br. at 22, 24, 26, 29. The Petitioner's strained attempts at gleaning support for these propositions from the legislative history and this Court's prior decisions should be rejected. Again, this Court has made it crystal clear, the ADA is about "substantial limitations, not utter inabilities." *Bragdon, supra,* 524 U.S. at 641. Adopting the Petitioner's unsupported propositions would only serve to create such a high barrier for ADA plaintiffs that the plain meaning and true purpose of the Act will be thwarted.

CONCLUSION

Simply put, the lower courts have not faithfully applied the overarching principles of the ADA. Indeed, those courts have succeeded in erecting a further barrier to the full societal participation of people with disabilities.

The Petitioner strongly urges this Court to reverse course and permit lower court judges to substitute their own judgment for that of a jury. Such wide-ranging power is not justified either by this Court's teachings on summary judgment standards or by its prior interpretations of the

statutory definition of disability. Accordingly, this Court should reject the Petitioner's invitation. Instead, this Court should not only affirm the Sixth Circuit's ruling in this case, but take the opportunity to reinforce the standards for considering a nonmoving plaintiff's burden in responding to motions for summary judgment.

Respectfully submitted,

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